No. 78-1803

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN RICHARD HUMPHRIES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 1979. A timely petition for rehearing was denied on April 5, 1979 (App. B, *infra*). The

time for filing a petition for a writ of certiorari was extended to and including June 1, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the testimony of a witness who could identify respondent as a participant in the offense charged should be suppressed as the tainted "fruit" of the unlawful arrest of respondent, when the police learned of the witness's identity and his knowledge of the crime by lawful means unrelated to the arrest.

2. Whether, when an unlawful search or seizure first leads the police to suspect an individual's criminal activity and serves in part as the stimulus for their subsequent investigations, all evidence developed in such investigations must be suppressed as the tainted "fruit" of the unlawful act.

STATEMENT

Respondent and four others were charged in a four-count indictment with conspiracy to import marijuana in violation of 21 U.S.C. 963, 21 U.S.C. 960(a)(1) and 925(a), conspiracy to distribute marijuana in violation of 21 U.S.C. 960(a)(1) and (b) and 952(a), and attempted possession of marijuana with intent to distribute it in violation of 21 U.S.C. 846 and 841(a)(1) and (b) and 18 U.S.C. 2.

Following two pretrial hearings, the district court suppressed "all evidence concerning the identity and participation of [respondent] in this case is sup-

pressed for the reason that the [government] has not shown that any of such evidence is derived from a source other than the illegal arrest of [respondent]" (App. A, *infra*, 2a).[1] The government appealed, and the court of appeals reversed in part, affirmed in part, and remanded for further proceedings (App. A, *infra*, 1a-22a).[2]

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[1] Two suppression hearings were held before different judges of the district court. After the first hearing, Judge Muecke found that respondent had been detained without probable cause and granted respondent's motion to suppress "the identity of John Richard Humphries as a defendant in this matter and any and all other physical evidence and statements obtained as a result of the illegal arrest of [respondent] in this matter." (App. A, *infra*, 2a). Eight days later, in view of uncertainties concerning the scope of Judge Muecke's order, the government filed a "Motion for Determination of Admissibility of Evidence", seeking to determine precisely what was to be suppressed (App. A, *infra*, 7a-8a). A hearing on this motion was held before Judge Davies, and further evidence was presented. Judge Davies denied the motion and ordered the suppression of "all evidence concerning the identity and participation of [respondent] in this case * * *." The government then appealed Judge Davies' order under 18 U.S.C. 3731.

[2] The court of appeals rejected the defense claim that there was no jurisdiction to entertain the appeal under the Criminal Appeals Act, 18 U.S.C. 3731, because the government had failed to appeal the initial order of Judge Muecke within 30 days. The court ruled: "Given the confusion surrounding the earlier order, and that the Government indeed presented different evidence in the hearing on its motion, we cannot agree with Humphries that the Government's actions were calculated to circumvent the requirements of the Criminal Appeals Act. The Government's appeal is one from Judge Davies' order suppressing all evidence relating to Humphries. Such an appeal is proper under § 3731 and was timely filed" (App. A, *infra*, 9a-10a; footnotes omitted).

1a. The evidence adduced at the hearings shows that on the afternoon of October 21, 1976, Everett Whiteman, a special officer with the Bureau of Indian Affairs (BIA), discovered an airplane that had crashed on a remote site within the San Carlos Indian Reservation in Arizona (I Tr. 46, 84; II Tr. 8).[3] Inside the airplane Whiteman found 1,500 pounds of marijuana and a motel receipt bearing the name James Thompson with an Aspen, Colorado, post office box address. No one was found in the airplane or in the adjacent area (I Tr. 48, 51, 85-86; II Tr. 9, 16, 37).

At 6:30 A.M. the following day, Whiteman questioned James Jameson (subsequently a co-defendant), who was parked in a 1971 Monte Carlo automobile two miles from the crashed airplane. Jameson told Whiteman that he lived in Tuscon and had stopped there after driving around following an argument with his wife (I Tr. 52-53; II Tr. 16-18). Jameson was not arrested at that time (I Tr. 97).

At 10:30 p.m. on October 23,[4] Whiteman received a radio dispatch informing him that Frank Sisto, a

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[3] "I Tr." refers to the reporter's transcript of the hearing on respondent's motion to suppress held on October 6, 1977, and "II Tr." refers to the reporter's transcript of the hearing on the government's motion for a determination of admissibility of evidence held on February 15, 1978. See note 1, *supra*.

[4] Earlier that same day, a Fish and Game ranger picked up co-defendants Lon Raymond Jordan and Jerry Robert Torres, who were hitchhiking near the plane crash site, and brought them to the police station in San Carlos for question-

San Carlos resident, had picked up two non-Indian strangers (respondent and co-defendant Ricardo Rubio) in an area near the crash site and driven them to a store one block from the San Carlos police station (I Tr. 56-58, 95).[5] Whiteman told another officer to take the two men to the police station so that he could question them about the airplane (I Tr. 57-58, 73-74, 105).

Shortly thereafter, Whiteman arrived at the police station and immediately advised respondent of his *Miranda* rights (I Tr. 59-62, 93, 103-104). Respondent said he understood his rights and signed a written waiver form (I Tr. 62-63). Respondent told Whiteman that he and his friend were hiking in San Carlos. Whiteman expressed disbelief because it was unusual for people to be hiking in the area during such rainy weather (I Tr. 63-64). When Whiteman informed respondent that he was investigating the crash of

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ing (I Tr. 53-54). Jordan and Torres told officer Whiteman that the previous night they had become intoxicated, picked up two Indian girls, driven out to the country, and stayed out all night (I Tr. 53-54). They were not then arrested (I Tr. 97).

[5] Sisto testified that on the evening of October 23, respondent and Rubio knocked on the door of his daughter's house, which is near the crash site, said that their truck had broken down, and asked to use the phone to summon assistance. Sisto offered to drive them to the police station, but they stated that they did not want to wait there, so Sisto drove them to the tribal store in San Carlos, where they could wait for someone to pick them up. Because the tribal store was closed and because he was worried and had a "funny feeling" about the two men (I Tr. 24), Sisto left them at the store but then called the police to help them (I Tr. 20-24).

an airplane with a load of marijuana, respondent asked if he was under arrest. Whiteman said he was not, and respondent refused to answer any more questions until he had spoken with his attorney (I Tr. 64). Whiteman did not ask any further questions or charge him with any offense, but he took respondent's photograph and fingerprints and obtained his date of birth, social security number, and address (which proved to be fictitious); Whiteman then allowed respondent to leave (I Tr. 59, 64-68, 103; II Tr. 19, 27, 47-48).[6]

Earlier that same day (October 23), a truck driver had given Whiteman the description of a hitchhiker (later identified as James Thompson), whom he drove from the area of the crashed plane to a nearby airport (II Tr. 12-14). On October 27, Whiteman spoke with Robert Mace, the manager of the airport, who told Whiteman that the hitchhiker had telephoned a cab company (II Tr. 13-14). The cab company informed Whiteman that it took the hitchhiker from the airport to the Cooper Manor Hotel. The hotel manager informed Whiteman that James Thompson of Colorado (the name on the motel receipt found in the airplane) had registered at the hotel on October 21, 1976 (II Tr. 15-16).

Whiteman then gave all the information he had uncovered to the Drug Enforcement Administration and to the Arizona Department of Public Safety,

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[6] Whiteman also advised Rubio of his *Miranda* rights and spoke with him for one-half hour. Rubio was fingerprinted and allowed to leave the police station (I Tr. 67-69).

Narcotics Enforcement Section; he did not participate further in the investigation (I Tr. 99; II Tr. 16, 18-19, 24-25, 37-38).

b. Officer Douglas Stine of the Arizona Public Safety Department received the information developed by Whiteman and was assigned to continue the investigation (2 Tr. 37-38). In the following weeks, Stine learned that the crashed aircraft was registered to a company in Chicago and that it had been sold to a person known only as "Bullet" Thompson, who lived in Colorado. Stine also learned that Thompson had stayed at the Lincoln-Shire Marriott Hotel near Chicago during September 1976 and had made several long distance telephone calls. Stine traced one of the telephone numbers called by Thompson to 10320 North 37th Street, Scottsdale, Arizona (II Tr. 39-41). The subscriber of the phone was Sara Braun, and the bill was guaranteed by John Alexander, who Stine knew had previously been arrested with Lon Jordon (who had been seen near the crashed plane) for drug smuggling (II Tr. 38, 41-42).

On November 17, 1976, Stine went to the Scottsdale residence and saw in the driveway the 1971 Monte Carlo that had been seen near the plane crash (II Tr. 42-43). Stine also observed respondent standing near the driveway. He identified respondent from a driver's license photograph he had obtained from the Arizona Motor Vehicle Division following receipt of respondent's name from the BIA (I Tr. 107-108; II Tr. 44-45, 59). On the basis of all of these observations, Stine ordered a 24-hour surveil-

lance of the residence from November 29 to December 4, 1976. During the surveillance, agents took photographs of the 20 to 30 people (including respondent) seen in and around the residence (II Tr. 45-46, 61, 63-64).

Meanwhile, in the first week of November 1976, Stine received a photograph of Dennis James Thompson from the Colorado Bureau of Investigation (II Tr. 46). The truck driver and the airport manager identified Thompson from the photograph as the person whom the driver had taken to the airport on October 23 (II Tr. 47). Thompson was thereafter arrested. Pursuant to a plea agreement, Thompson agreed to cooperate with the government and was interviewed by Stine in February 1977.[7] Stine asked Thompson whether he knew respondent, and Thompson replied that he had known him since December 1975 and had participated in at least 14 smuggling ventures with him (II Tr. 49-50, 53). Thompson also identified respondent from the surveillance photographs taken at the Scottsdale residence (II Tr. 53).[8]

2. The court of appeals affirmed the suppression of evidence of the surveillance of the Scottsdale residence, including the photographs taken there, on the ground that this evidence was the fruit of respondent's illegal arrest by the BIA police officer. The court reasoned (App. A, *infra*, 18a):

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[7] Thompson pled guilty to a state charge of unlawful possession of marijuana for sale.

[8] Stine also may have shown Thompson respondent's photograph taken by the BIA (II Tr. 62).

> Stine exploited the illegal arrest of [respondent] when he used information gathered during [respondent's] detention to identify [respondent] in Scottsdale. That identification played a large part in Stein's ordering the stakeout of that residence. Thus, the road from the illegal actions of the BIA to the evidence gained by surveilling was short and straight.

The court also affirmed the suppression of any testimony by Thompson identifying Humphries as a participant in the offense (App. A, *infra*, 19a-21a). Although it acknowledged that Stine's location of Thompson was untainted by respondent's arrest by the BIA police (*id.* at 19a and n.13), it held that Thompson's testimony nevertheless had to be suppressed on the ground that "Thompson only implicated [respondent] in the marijuana smuggling operation upon being asked specifically about him. And Stine questioned Thompson specifically about [respondent] only because of information [*i.e.*, respondent's identity] tainted by the illegal arrest" (*ibid*). The court concluded that Thompson's testimony could not be deemed an act of free will that could dissipate the taint, because "Thompson answered Stine's questions as part of a 'plea agreement' " (*id.* at 21a).[9]

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[9] The court of appeals ruled further that since Frank Sisto's "testimony and identification were based solely on his contact with [respondent] * * * prior to [respondent's] unlawful arrest, * * * [and] was not in any way a 'fruit' of that unlawful arrest" (App. A, *infra*, 12a), it should not have been excluded by the district court. The panel also found that any testimony by Stine that would identify the car observed at

REASONS FOR GRANTING THE PETITION

This case presents several important questions concerning the scope and application of the exclusionary rule and the fruit-of-the-poisonous tree doctrine that we believe merit review by this Court.

1. The suppression of all testimony by James Thompson that would identify respondent as a participant in the offenses charged presents an issue that is the same in principle as the question pending before the Court in *United States* v. *Crews*, cert. granted No. 78-777, (Feb. 21, 1979).

In *Crews*, the court of appeals suppressed the in-court identification testimony of a crime victim, whose identity and knowledge of the crime were known to the police from the outset, on the ground that it was the tainted fruit of a later unlawful detention of the defendant that produced a photograph by which the victim identified the defendant to the police. Our principal contention in *Crews* is that evidence that is lawfully acquired by the police should not be excluded when the sole "taint" concerns the manner by which that evidence becomes linked to the defendant. Although it could be said in cases like *Crews* that the witness's knowledge of the crime acquired prosecutive utility by virtue of the defendant's later arrest—and that the witness's testimony was in that sense causal-

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the Scottsdale residence as the same vehicle seen near the crash site was based on evidence independent of respondent's unlawful arrest and, therefore, was improperly suppressed (*id.* at 14a-16a).

ly related to the unlawful act—we argue that neither this Court's decisions nor the purposes and policies of the exclusionary rule support the suppression of evidence on the basis of that kind of nexus between the challenged evidence and police misconduct.[10]

Our argument in *Crews* applies equally to Thompson's testimony in this case. The record here shows, as the court of appeals acknowledged (App. A, *infra*, 19a), that Officer Stine located and contacted Thompson and learned of his knowledge of the crime by pursuing a line of investigation entirely independent of the arrest of respondent by the BIA. Employing reasoning similar to the court of appeals in *Crews*, however, the court concluded that Thompson's testimony would be the "fruit" of respondent's arrest by the BIA because, in the court's view, Stine's particularized inquiry to Thompson about respondent would not have been made had respondent's arrest not made Stine aware of his identity. In other words, the arrest enabled Stine to link Thompson's knowledge of the crime to a particular individual, and in that sense gave that knowledge prosecutive utility. The causal

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[10] In addition we argue in *Crews* that even if it were proper to consider such evidence as a potentially suppressible "fruit" of police misconduct, the application of established principles of attenuation, to the facts in that case support the admission of the victim's testimony. We also urge that whatever principles should govern the application of the exclusionary rule to other kinds of evidence, the Court should reject the suppression of the reliable identification testimony of the victim of a crime as a matter of exclusionary rule policy. Those additional arguments are not directly pertinent to this case.

relationship (or absence thereof) between the suppressed evidence and the police misconduct is thus the same as in *Crews*. For the reasons we have stated in *Crews*, that relationship does not afford a proper basis for suppression of evidence.[11]

2. In our view, therefore, this Court's decision in *Crews* may well establish that the court of appeals incorrectly suppressed Thompson's testimony. The decision below, however, presents another, distinct exclusionary rule issue—pertaining both to the suppression of Thompson's testimony and to the ad-

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[11] *Crews* differs from the instant case in one factual respect that, in our view, is not material to the principle involved. In *Crews* the witness and her knowledge of the crime and the appearance of her assailant were known to the police before the defendant was unlawfully arrested. In this case the witness, Thompson, was not located and his availability to testify was not ascertained until several months after respondent's unlawful arrest. That difference in chronology is not significant, however, because in both cases the witness became known to the police by means entirely unrelated to the unlawful act, and in both cases the only basis for exclusion is that the unlawful act linked what the police knew to a particular individual.

Both the instant case and *Crews* are thus different from cases like *United States* v. *Ceccolini*, 435 U.S. 268 (1978), where some unlawful act leads the police to discover the identity of a witness and his knowledge of relevant facts previously unknown to the police. Such cases involve the conventional kind of relationship between evidence and police misconduct that the courts have traditionally considered in applying the fruit-of-the-poisonous-tree doctrine and the related doctrine of attenuation. As we have argued in *Crews*, the causal nexus involved there (and in this case) is quite different from the conventional nexus, and principles of attenuation are not readily applicable.

missibility of photographs and other evidence derived from the surevillance of the Scottsdale residence. At least as to the latter category of evidence, which is significant ~~substantial~~ to this prosecution, the legal issue will not be resolved by the decision in *Crews*. The issue is an important one that independently merits this Court's plenary consideration.

Even if it were appropriate to regard the identification testimony of a witness like Thompson as the kind of evidence that is subject to the exclusionary rule, the court of appeals misconceived the doctrine of attenuation and erred in concluding that Thompson's testimony and the photographs taken during the surveillance of the Scottsdale residence were not sufficiently attenuated from respondent's illegal detention to dissipate the taint. At stake here is an issue of some moment for future application of the exclusionary rule: When an illegal search or seizure has the effect of focusing suspicion on a particular individual, to what extent is evidence disclosed by subsequent, lawfully conducted investigations of that individual to be deemed a suppressible fruit of the original, suspicion-engendering violation? The resolution of this question by the court of appeals conflicts with decisions of the Second Circuit and is, we submit, contrary to proper attenuation analysis as outlined by this Court.

In this case, after respondent's brief detention by BIA police, Officer Stine conducted a lengthy and wide ranging investigation of respondent and others that was in large part based on and stimulated by

information entirely unrelated to the information derived from that detention. Thus, as the court below acknowledged (App. A, *infra*, 14a-16a) it was an independent line of investigation that led Stine to the Scottsdale residence.[12] Furthermore, as the court of appeals also recognized, it was an independent line of investigation that resulted in Stine's locating and interviewing Thompson (App. A, *infra*, 19a).

Stine developed his information from a variety of sources, the investigation was lengthy, and Thompson had an independent motivation for testifying. The court of appeals nevertheless concluded that because the various steps in the investigation were in part motivated by Stine's suspicion of respondent (which was in turn based on a tainted source), the observations of events at the residence, the surveillance photographs, and Thompson's in-court testimony were all tainted fruits of respondent's arrest.

The court's conclusion suggests that whenever some unlawful act causes the police to suspect an individual of criminal conduct, and that suspicion serves in part as the impetus for a subsequent investigation of the individual, all of the fruits of that investigation are tainted and must be suppressed. Such a view, if accepted, would in most cases effectively immunize from prosecution an individual who first aroused police

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[12] There he observed not only respondent (whom he recognized from photographs derived from his arrest) but also the 1971 Monte Carlo seen near the crash site (see pages 7-8 *supra*, and App. A, *infra*, 14a-16a). On the basis of all of that information, Stine ordered a surveillance of the residence (II Tr. 45-46, 61, 63-64).

suspicions as a result of some act infringing his Fourth Amendment rights.

This conclusion conflicts squarely with decisions of the Second Circuit, which can be traced back to the view expressed by Judge Learned Hand in his opinion on remand from this Court's decision in *Nardone* v. *United States*, 308 U.S. 338 (1939). See *United States* v. *Nardone*, 127 F.2d 521 (2d Cir. 1942), cert. denied, 316 U.S. 698 (1941). Although the evidence developed on the remand in that case established that illegal wiretaps and other improperly acquired information had persuaded federal agents that the defendant was implicated in a crime and thus provided the impetus for the investigation and eventual prosecution, Judge Hand emphatically rejected the proposition that "a prosecution must show, not only that it has not used any information illicitly obtained * * * but that the information has not itself spurred the authorities to press an investigation which they might otherwise have dropped. We do not believe that the Supreme Court meant to involve the prosecution of crime in such a tenebrous and uncertain inquiry, or to make such a fetich [*sic*] of the statute as so extreme an application of it would demand" (127 F.2d at 523). As the Second Circuit said more recently in rejecting a suppression claim on similar facts in *United States* v. *Friedland*, 441 F.2d 855, 861 (2d Cir.), cert. denied, 404 U.S. 867 (1971):

> * * * [T]o grant life-long immunity from investigation and prosecution simply because a violation of the Fourth Amendment first indicated to the police that a man was not the law-abiding

> citizen he purported to be would stretch the exclusionary rule beyond tolerable bounds.

Accord, *United States* v. *Cole*, 463 F.2d 163, 171-174 (2d Cir.), cert. denied, 409 U.S. 942 (1972).[13]

The court of appeals' conclusion is also contrary to principles of attenuation established by this Court. The Court has identified a number of factors that are relevant to determining whether the connection between an unlawful act and derivative evidence is sufficiently attenuated to dissipate the taint. These include the "temporal proximity" of the violation to the evidence sought to be introduced, "the presence of intervening circumstances * * *," the free will of the witness, "and particularly, the purpose and flagrancy of the official misconduct." *Brown* v. *Illinois*, 422 U.S. 590, 603-604 (1975); *United States* v. *Ceccolini*, 435 U.S. 268, 274-280 (1978).

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[13] Indeed, prior decisions of the Ninth Circuit reflect the same conclusion. See *United States* v. *Sand*, 541 F.2d 1370, 1376 (9th Cir. 1976) ("Whether there would have been an investigation of [the defendants] had there been no unlawful searches * * * is * * * of no consequence. Absent a showing, which defendants did not make, that the government utilized illegally secured information *to obtain more than defendants' identities*, there is no violation of the Fourth Amendment") (emphasis added). See also *United States* v. *Cella*, 568 F.2d 1266 (9th Cir. 1977); *United States* v. *Cales*, 493 F.2d 1215, 1216 (9th Cir. 1974); *United States* v. *Bacall*, 443 F.2d 1050, 1057 (9th Cir.), cert. denied, 404 U.S. 1004 (1971). Although we sought rehearing based, *inter alia*, on those cases, our petition was denied (App. B, *infra*, 23a).

In this class of cases, consideration of these factors should almost always lead to the conclusion that the evidence is sufficiently free of taint to be admissible, because the evidence will be the product of an independent, lawfully conducted investigation that by its nature will constitute a substantial intervening factor attenuating any taint.[14] This case thus pro-

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[14] In this case the court of appeals gave no significant consideration to most of the attenuation factors identified by this Court. Examination of those factors, in our view, compels the conclusion that the evidence produced by Agent Stine's extensive investigation bears an insufficient nexus to the original detention of respondent on the San Carlos Reservation to justify suppression. The investigation extended over a period of several months and entailed careful follow-up of lawfully obtained clues, such as the paper bearing Thompson's name found in the wreckage and the 1971 Monte Carlo automobile, seen near the crash site and again at the house that Thompson had called. If the course of the intervening investigation here was insufficient to attenuate any taint, it is hard to imagine a case in which usable evidence could be obtained following an initial Fourth Amendment violation that focuses police suspicions on an individual.

Another significant intervening factor in this case is the independent motivation of the witness, Thompson, to testify. The court of appeals disregarded that factor on the ground that his testimony could not be said to be an act of free will because his answers to Stine were induced by his plea agreement (App. A, *infra*, 21a). The court's conclusion that the existence of a plea agreement necessarily precludes a finding that the witness's testimony is an act of free will is, in our view, erroneous, and is in conflict with decisions of other courts of appeals. See *United States* v. *Houltin*, 566 F.2d 1027, 1032 (5th Cir. 1978); *United States* v. *Hoffman*, 385 F.2d 501, 504 (7th Cir. 1967); *Brown* v. *United States*, 375 F.2d 310, 314-315 (D.C. Cir. 1966). Cf. *Hutto* v. *Ross*, 429

vides an occasion for the Court to consider adoption of the principle enunciated by Judge Hand—that an illegal search or seizure that arouses suspicion but does not directly lead to the discovery of the evidence to be used by the prosecution at trial affords no basis for suppression of that evidence. In the alternative, the Court might determine that evidence of this kind is best treated in the manner suggested in *Ceccolini* for live-witness testimony: *i.e.*, that conventional attenuation analysis is appropriate, but that exclusion should be ordered only upon the clearest showing of non-attenuation. Whatever the ultimate conclusion, the issue is one of general significance on which this Court can provided needed guidance to the lower courts.

3. Because the broad legal issue discussed in point 2, *supra*, as well as the specific question of the admissibility of significant portions of the government's evidence in this case, will not be affected by the deci-

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U.S. 28 (1976); but cf. *United States* v. *Scios*, 590 F.2d 956 (D.C. Cir. 1978) (en banc).

A word is also in order at this point about the factor of flagrancy identified in *Brown* v. *Illinois*, *supra*, 422 U.S. at 604. Though we have not contended that it was lawful, respondent's detention could hardly be described as a flagrant violation of his rights in the circumstances. He was a stranger walking in a remote area of an Indian reservation near the crash site, had no means of transportation, and gave the police a questionable explanation for his presence. These facts certaintly warranted a reasonable suspicion that he was associated with the crashed plane. Moreover, the detention itself was minimally intrusive; respondent was not detained for an extensive period or charged with an offense, and he was advised of his rights and permitted to leave when he exercised them.

sion in *Crews*, we are asking that the Court grant the instant petition and set the case for plenary consideration. If the Court determines, however, that the second question does not warrant such consideration, then we believe this petition should be held for disposition as appropriate in light of the decision in *Crews*, for the reasons set forth in point 1, *supra*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1979

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 78-1622

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

JOHN RICHARD HUMPHRIES, DEPENDANT-APPELLEE

Jan. 19, 1979

Appeal from the United States District Court for the District of Arizona.

Before CHOY and SNEED, Circuit Judges, and KELLEHER,* District Judge.

CHOY, Circuit Judge:

This is an appeal from the district court's denial of the Government's "Motion for Determination of Admissibility of Evidence" and further order that "all evidence concerning the identity and participation of defendant HUMPHRIES in this case is suppressed." We affirm in part, reverse in part and remand.

I. *Statement of the Case*

On April 20, 1977, an indictment was returned against appellee Richard Humphries and four others and was filed in the United States District Court for the District of Arizona. The indictment charged each of the defendants with conspiracy to import mari-

juana, conspiracy to distribute marijuana, importation of marijuana, and attempt to possess marijuana with intent to distribute it.[1]

Humphries moved for an order suppressing his identity "as a defendant in this matter and any and all other physical evidence and statements obtained as a result of the illegal arrest of [Humphries] in this matter." Judge Muecke heard the argument on Humphries' motion and granted that motion on January 26, 1978.

On February 3, the Government moved for a "Determination of Admissibility of Evidence." This second motion was heard by Judge Davies, who denied it on February 17, ordering that

> all evidence concerning the identity and participation of defendant HUMPHRIES in this case is suppressed for the reason that the Plaintiff has not shown that any of such evidence is derived from a source other than the illegal arrest of defendant HUMPHRIES.

The Government appeals from this second order. On May 25, two members of this court denied Humphries' motion to dismiss the appeal for failure to file timely notice of appeal.[2]

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[1] 18 U.S.C. § 2, 21 U.S.C. §§ 841(a)(1), 841(b), 846, 952(a), 960(a)(1), 960(b), 963.

[2] While the motion panel was presented with the merits of the jurisdictional issue in this case, we do not consider their denial of Humphries' motion to dismiss the appeal to have foreclosed our ultimate reconsideration and disposition. *See United States* v. *Emens*, 565 F.2d 1142, 1144 n.2 (9th Cir. 1977).

II. *Jurisdiction*

Humphries contends that this court is without jurisdiction over the United States' appeal in this case. He urges that the Government has attempted to circumvent the requirements of 18 U.S.C. § 3731 by moving for a "Determination of Admissibility" and appealing within 30 days of that order, but more than 30 days after the district court's initial decision on Humphries' suppression motion. We hold that we have jurisdiction to hear this appeal.

The courts often have been called upon to construe 18 U.S.C. § 3731, the Criminal Appeals Act.[3] Of their decisions, Professors Wright and Miller have said:

> Appeals [under § 3731] are clearly allowed from interlocutory orders suppressing or excluding evidence or requiring the return of property, in marked contrast to the rules governing appeals by criminal defendants or witnesses.

15 Wright & Miller, Federal Practice and Procedure § 3919, at 656; (footnote omitted); *see, e.g., United*

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[3] In relevant part, § 3731 provides:

> An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts [sic] suppressing or excluding evidence . . . not made after the defendant has been put in jeopardy and before the verdict or finding . . . .
>
> The appeal, in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.
>
> * * * * *
>
> The provisions of this section shall be liberally construed to effectuate its purpose.

States v. *Donovan*, 429 U.S. 413, 421 n.8, 97 S.Ct. 658, 50 L.Ed.2d 652 (1977); *United States* v. *Martinez-Fuerte*, 514 F.2d 308, 310 (9th Cir. 1975), *rev'd on other grounds*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976).

Section 3731 is broadly construed, for its legislative history makes it clear

> [that] Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit.

United States v. *Martin Linen Supply Co.*, 430 U.S. 564, 568, 97 S.Ct. 1349, 1353, 51 L.Ed.2d 642 (1977), *quoting United States* v. *Wilson*, 420 U.S. 332, 337, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975).[4] The only

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[4] Congress has said of § 3731:

> The amended Criminal Appeal[s] Act [§ 3731] is intended to be liberally construed so as to effectuate its purpose of permitting the Government to appeal from dismissals of criminal prosecutions by district courts in all cases where the Constitution permits, and from all suppressions and exclusions of evidence in criminal proceedings, except those ordered during trial of an indictment or information.

S. Rep. No. 1296, 91st Cong., 2d Sess. (1970), at 18. "The phrase 'suppressing or excluding evidence . . .' should be read broadly, not narrowly as a similar statutory term has been interpreted." *Id.* at 37. *citing United States* v. *Greely*, 134 U.S.App.D.C. 196, 413 F.2d 1103 (1969) (refusal of trial court to reopen suppression hearing is not "order, granting . . . a motion to suppress evidence" under earlier version of § 3731) as exemplifying improper narrow construction.

The conference report on the Omnibus Crime Control Act, Pub. L. No. 91-644, recognized that the Senate version of § 3731 eliminate "[t]echnical distinctions in pleadings as limitations on appeals by the United States," H.R. Rep. No. 1768,

limitation on Government appeals under § 3731 is the double jeopardy clause of the United States Constitution. *United States* v. *Rojas*, 554 F.2d 938, 941 (9th Cir. 1977), *supplemented*, 574 F.2d 476 (9th Cir. 1978); *see* note 4 *supra*.

Humphries contends that the Government's appeal is not properly before this court because it is a "Motion to Determine the Admissibility of Evidence" and not within the express language of § 3731. Humphries does not argue that the Government's appeal here violates the constitutional prohibition against placing him twice in jeopardy.

To hold that the order here is not appealable under § 3731 because a denial of a "Motion to Determine the Admissibility of Evidence" is not a "decision . . . suppressing or excluding evidence" is to focus on the title of the Government's motion rather than the effect of the district court's order. Such an approach flies in the face of the intent of Congress and is contrary to consistent judicial authority. Section 3731 must be construed broadly; a Government appeal should not be rejected on a hypertechnical juris-

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91st Cong., 2d Sess. (1970), at 21, U.S.Code Cong. & Admin. News 1970, p. 5848. It continued:

> The conference substitute conforms to the Senate amendment except that it provides that an appeal by the United States shall lie to a court of appeals from a decision, judgment or order of a district court dismissing an indictment or information . . . but that no appeal shall lie in any case in which the Double Jeopardy Clause of the United States Constitution prohibits further prosecution.

Id.

dictional ground. Thus, we refuse to limit the Government's right to appeal under § 3731 solely because of the title of its motion. Instead, we "focu[s] on the effect of the ruling sought to be appealed." *United States* v. *Martin Linen Supply Co.*, 534 F.2d 585, 587 n.3 (5th Cir. 1976), *aff'd*, 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977); *see United States* v. *Wilson*, 420 U.S. 332, 95 S.Ct. 1013, 43 L.El.2d 232.

Humphries alternatively argues that the Government has in fact appealed from the January 26 order of Judge Muecke; that the Government's "Motion to Determine the Admissibility of Evidence" and its appeal from Judge Davies' order denying that motion were merely an attempt to circumvent the time limits on appeals under § 3731.

Judge Muecke's order granted Humphries' motion that

> the identity of JOHN RICHARD HUMPHRIES as a defendant in this matter and any and all other physical evidence and statements obtained as a result of the illegal arrest of the defendant [be suppressed] in this matter.

His decision did not elaborate on what evidence was covered by his order; the opinion merely addressed the illegality of the arrest or detention of Humphries.

The Government made its "Motion to Determine the Admissibility of Evidence" eight days after Judge Muecke entered his order. The Government did not challenge Judge Muecke's order; instead it sought only a decision on whether "certain identification evi-

dence concerning defendant HUMPHRIES" was admissible under the previous order. A careful review of the transcripts and record in this case indicates that there was considerable confusion as to the scope of Judge Muecke's ruling[5] and that the testimony

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[5] Humphries has argued both to this court and below that the Government's motion was only an attempt to relitigate matters covered by Judge Muecke's order. The Government has countered that its motion was aimed at determining whether certain evidence was obtained as a result of the illegal arrest of Humphries and thus excluded under Judge Muecke's order.

In arguing its position, the Government points out a statement made by Humphries' counsel during the hearing before Judge Muecke:

> Then, of course, we run into the problem, going down the line, as to what is or what is not tainted . . . .

Yet the order of Judge Muecke merely granted the motion by Humphries that all identification evidence as to him be suppressed. We find that the transcript of the hearing before Judge Davies further indicates the confusion of the parties and the court:

> THE COURT: Gentlemen, the reason I asked you to come in, I think I know of a way to solve this thing, deny the government's motion and let them appeal it. I don't think we are going to try this case only once and in its present posture. And that way I get a chance to find out if there is any doubt about Judge Muecke's order as well.
>
> MR. NOYES: I think if the Court is troubled by it, that is possibly the better thing to do than proceed with the trial.
>
> THE COURT: I am troubled by it, you bet. It is going to be extremely difficult to try it in the posture of this case in view of the order and the different interpretations you gentlemen place on it.
>
> * * * * *

presented in the hearing before Judge Davies on the Government's motion was significantly different from that presented to Judge Muecke on the previous motion.[6]

THE COURT: Clearly counsel will be up more time on his feet than in his chair, objecting.

MR. HOFFMAN: I don't see how I can sit down. And I brought along uncomfortable shoes.

THE COURT: I believe that is the best way, Do you see any other—

MR. HOFFMAN: I don't, Your Honor.

THE COURT: The motion is denied.

[6] In the hearing on Humphries' Motion to suppress, the Government presented the following evidence: (1) the testimony of Frank Sisto that he had picked up two men and taken them to the tribal store in San Carlos to await a ride home and that Humphries, seated in the courtroom, was one of those men and (2) the testimony of Everett Little Whiteman, Special Office for the Bureau of Indian Affairs concerning the illegal arrest or detention, photographing and fingerprinting of Humphries. In support of his motion, Humphries called Douglas R. Stine, an agent of the Arizona Department of Public Safety, Narcotics Enforcement Division, who testified that his part in the investigation of this case included investigating some telephone calls from a suspect in the case to a certain address in the Phoenix area, and that in surveilling that address he identified Humphries from a driver's license photograph he had previously obtained because Agent Little Whiteman had given him Humphries' name.

In the hearing on the Government's motion before Judge Davies, the Government elicited testimony of an entirely different nature, even though the same individuals testified. The evidence in the second hearing concerned the discovery of the crash site by Agent Little Whiteman and his follow-up investigation leading to the identification of James Thompson, the pilot of the downed plane. Agent Stine testified that based on this information, which Little Whiteman gave him, and because Little Whiteman supplied Stine with Humphries'

Given the confusion surrounding the earlier order, and that the Government indeed presented different evidence in the hearing on its motion, we cannot agree with Humphries that the Government's actions were calculated to circumvent the requirements of the Criminal Appeals Act.[7] The Government's appeal is

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name, Stine staked out a certain address called by Thompson, identified Humphries at that address, took a photograph of Humphries at that address, and asked Thompson whether he knew Humphries and about Humphries' involvement in the marijuana smuggling operation.

Clearly, then, the evidence presented to Judge Davies in the hearing on the Government's motion did not merely duplicate that heard by Judge Muecke. Thus it does not appear to us that the Government was merely attempting to relitigate matters already determined in Judge Muecke's order. Judge Davies recognized this fact when he said

> The government may, in view of this Court, produce independent, nonrelated, untainted evidence [of Humphries' identity] in these proceedings that is not at all void by the order moved by Judge Muecke . . .

and when he made it clear that his denial of the Government's motion was based not on the ground "that it was encompassed by Judge Muecke's order" but on the ground that the Government had failed to meet the Ninth Circuit requirements as to its burden of showing that the evidence offered was not tainted by the illegal arrest/detention. We agree with Judge Davies' position that the Government's motion was not foreclosed by Judge Muecke's ruling.

[7] Even if we assume, *arguendo*, that Humphries is correct in characterizing the Government's motion and appeal from Judge Davies' order as an attempt to relitigate a matter already decided by Judge Muecke, and that he is correct in his contention that the appeal is in fact one from the order of Judge Muecke, this appeal would not be barred by the 30 day limitation contained in § 3731. That limitation period is not

one from Judge Davies' order suppressing all evidence relating to Humphries. Such an appeal is proper under § 3731 and was timely filed.[8] We thus have jurisdiction over this appeal.

III. *Suppression of Evidence*

Judge Davies ordered that all evidence concerning Humphries' identity and participation in the marijuana smuggling operation in this case be suppressed. The Government appeals from this order only as to three categories of evidence: (1) the testimony of Frank Sisto; (2) evidence gained as the result of the surveillance of a residence in Scottsdale, Arizona; and (3) the testimony of James "Bullet" Thompson, the alleged pilot of the crashed marijuana-laden plane involved in this case.

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jurisdictional. *Meier* v. *Keller*, 521 F.2d 548, 553 (9th Cir. 1975), *cert. denied*, 424 U.S. 943, 96 S.Ct. 1410, 47 L.Ed.2d 348 (1976). Although appeals after the 30 day period are "not to be regarded with favor," *id.* where, as here, there is no showing of bad faith on the part of the Government in delaying the appeal, no prejudice has resulted to any party, and the Government appears to be prosecuting the case diligently, this court may exercise jurisdiction over an appeal under § 3731. The Government should not be penalized for providing the district court with an opportunity to reconsider its earlier decision, especially when there appears to be a great deal of confusion about the meaning of that decision.

[8] Judge Davies' order was entered on February 17, 1978. The Government filed its appeal with this court on March 17, 1978, within the 30 day limit of § 3731.

A. *Sisto's Testimony*

Frank Sisto testified that on the evening of October 23, 1976, he met two strangers at the home of his daughter, just north of San Carlos, Arizona.[9] One of the men introduced himself as "Tony" and explained that their truck had broken down about three miles north of the residence. He asked to use the telephone to call his wife to pick them up. When Sisto gave his permission to use the phone, "Tony" asked where the best place to wait for his wife would be. Sisto suggested the San Carlos police station but "Tony" said that he did not wish to wait there. Sisto then suggested the tribal store in San Carlos and offered to give the two men a ride to that point. "Tony" accepted Sisto's offer. After taking the two men to the store, Sisto called the police station because he was "worried" and had a "funny feeling" about them.

Sisto's message was passed along to Bureau of Indian Affairs (BIA) Special Agent Little Whiteman, who was investigating a downed aircraft loaded with marijuana near the area where Sisto initially saw the two men. Little Whiteman ordered one of his officers to go to the tribal store to see if the two were still there. Upon receiving word that the two men were still at the tribal store, Little Whiteman ordered

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[9] San Carlos is wholly within an Apache Indian Reservation. The police organ in San Carlos is headed by Bureau of Indian Affairs Special Agent Everett Little Whiteman.

them brought in for questioning. This detention was held an illegal arrest by Judge Muecke.[10]

In court Sisto pointed to Humphries as one of the men to whom he had given a ride. His testimony and identification were based solely on his contact with Humphries and his codefendant, Richardo Rubio ("Tony") prior to the unlawful arrest. It is not in any way a "fruit" of that unlawful arrest. *See United States* v. *Williams*, 436 F.2d 1166, 1170 (9th Cir. 1970), *cert. denied*, 402 U.S. 912, 91 S.Ct. 1392, 28 L.Ed.2d 654 (1971). Thus, we reverse Judge Davies' order insofar as it suppresses Sisto's testimony.[11]

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[10] The Government does not take issue with Judge Muecke's ruling that the San Carlos detention of Humphries was an illegal arrest.

[11] Humphries argues that the Government is barred from contesting the suppression of Sisto's testimony as Sisto did not testify before Judge Davies. However, Sisto did testify before Judge Muecke. As we have indicated *supra*, Judge Muecke's order left the parties in some confusion over what evidence had in fact been suppressed. In the memorandum accompanying the Government's motion, essentially one to determine the scope of Judge Muecke's order, it was argued that Sisto's testimony was free of the taint of the illegal arrest of Humphries.

Thus, the issue of the admissibility of Sisto's testimony was squarely before Judge Davies. We do not believe that it is necessary that Sisto have testified before Judge Davies for this court to review the suppression of his testimony, given the procedural posture of the Government's motion below.

B. *The Surveillance Evidence*

Agent Little Whiteman testified before Judge Davies concerning the discovery of a downed airplane containing a large quantity of marijuana. He related the discovery of papers in the plane and his follow-up investigation which led to the identification of James "Bullet" Thompson as the pilot of that aircraft. This information, along with information obtained during the illegal arrest and detention of Humphries (name, address, fingerprints and photograph), was eventually passed to Agent Stine of the Arizona Department of Public Safety, Narcotics Enforcement Division (DPS). Little Whiteman also gave Stine the description and license number of a beige 1971 Chevrolet Monte Carlo that he had stopped near the crash site.

On the basis of this information, Stine obtained a driver's license photograph of Humphries and proceeded to attempt to locate the pilot, Thompson, by investigating a Scottsdale address called by Thompson while he was in Chicago. Arriving at the Scottsdale residence, Stine noticed a beige Monte Carlo in the driveway. Unable to read the license plate from the street, he drove up the driveway and positively identified the auto as the one stopped by Little Whiteman. He also noticed two persons at the residence while in the driveway, one of whom he identified as Humphries from the driver's license photo in his possession.

Relying on the information from Little Whiteman and his observations while in the driveway, Stine ordered around-the-clock surveillance of the Scotts-

dale address. During the course of their stakeout, DPS agents photographed Humphries and others at the residence.

In the hearing before Judge Davies, the Government stipulated that it would not introduce evidence concerning the identification of Humphries made by Stine in the driveway of the Scottsdale residence. Therefore, we are concerned only with the admissibility of the license number of the Monte Carlo and the photographs and other evidence garnered as a result of the surveillance of the residence.

1. *Identification of the Automobile in Scottsdale*

The license plate number and description of an automobile which Stine had when he spotted the car in Scottsdale and entered the driveway to check the license plate of that car was derived from a stop of a vehicle by BIA agents. The legality of that stop is unchallenged in this case. Moreover, the stop was wholly unrelated to the illegal arrest of Humphries. Thus, the BIA information concerning the auto stopped near the crash site was untainted; its use by Stine was not improper.

However, Humphries points out that Stine matched the license plate number of the car in Scottsdale with the number in his possession only by trespassing onto a private driveway. Judge Davies' order and opinion, holding as it did that the license number identification was tainted by Humphries' illegal arrest, did not reach Humphries' trespass theory. Since we have concluded that the illegal arrest of Humphries did not

taint the BIA information concerning the auto stopped near the crash site, we must reach this claim.

In *Katz* v. *United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), the Supreme Court noted that "[t]he premise that property interests control the right of the Government to search and seize has been discredited." *Id.* at 353, 88 S.Ct. at 512, *quoting Warden* v. *Hayden*, 387 U.S. 294, 304, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967). It concluded that "the Fourth Amendment protects people, not places." *Id.* at 351, 88 S.Ct. at 511; *see Warden* v. *Hayden*, 387 U.S. at 304, 87 S.Ct. at 1648 ("the principal object of the Fourth Amendment is the protection of privacy rather than property"). "[T]he reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrustion . . . ." *Katz* v. *United States*, 389 U.S. at 353, 88 S.Ct. at 512.

Only when there is an invasion of some reasonable expectation of privacy can police action constitute a search subject to the strictures of the fourth amendment. *See United States* v. *Santana*, 427 U.S. 38, 42, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976); *Katz* v. *United States*, 389 U.S. at 349-53, 88 S.Ct. 507. Although a driveway may be private under common law notions of property, it may not be for purposes of the fourth amendment. *See United States* v. *Santana*, 427 U.S. at 42, 96 S.Ct. 2406 (doorway of private home a "public place" where visible from street); *United States* v. *Hersh*, 464 F.2d 228, 230 (9th Cir. 1972) (officers going upon front porch of house and looking into window did not violate fourth amendment privacy rights).

Considering all of the circumstances surrounding Stine's entry into the driveway and identification of the Monte Carlo as the automobile previously stopped by BIA agents near the crash site, we conclude that the entry and identification did not violate any reasonable expectation of privacy held by Humphries. The auto was visible from the street. It does not appear from the record that the driveway was enclosed by a fence, shrubbery or other barrier. Stine did not move bushes or other objects in order to make his observations. *See United States* v. *Hersh*, 464 F.2d at 230; *United States* v. *Davis*, 327 F.2d 301, 303-04 (9th Cir. 1964). Moreover, a license plate is affixed on an automobile for the very purpose of allowing identification of it by law enforcement agencies and others.[12]

Thus, Stine's conduct did not constitute a search subject to fourth amendment limitations. His testimony regarding his identification of the car was improperly suppressed. We reverse Judge Davies' order insofar as it suppresses that testimony.

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[12] We do not today hold that the license number of an automobile is never protected by the fourth amendment. Instead, we only recognize that the nature of a license plate, something designed specifically for identification purposes, affects the reasonableness of expectations of privacy concerning it. In this case, all of the circumstances surrounding Stine's actions indicate that Humphries had no reasonable expectation of privacy as to the license number of the auto parked in the Scottsdale driveway. The nature of the license plate is only one factor in our decision.

2. *Photographs and Other Surveillance Evidence*

Agent Stine testified that the surveillance of the Scottsdale residence was undertaken because of his identification of Humphries and the automobile while he was in the driveway of that address. The surveillance and all evidence derived from it is tainted by the illegal arrest of Humphries.

In *Wong Sun* v. *United States*, the Supreme Court announced the appropriate test of whether evidence is inadmissible as the fruit of unlawful police action:

> Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

371 U.S. 471, 488, 83 S.Ct. 407, 417, 9 L.Ed.2d 441 (1963), *quoting* Maguire, Evidence of Guilt 221 (1959). Exploitation of illegalities is the focus of the fruits doctrine for the reason that the exclusionary rule is aimed at deterring police conduct in violation of the fourth amendment "in the only effectively available way—by removing the incentive to disregard it." *Stone* v. *Powell*, 428 U.S. 465, 484, 96 S.Ct. 3037, 3047, 49 L.Ed.2d 1067 (1976), *quoting Elkins* v. *United States*, 364 U.S. 206, 217, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960).

Concern for fourth amendment rights must be balanced against the costs of the exclusionary rule, for

> [a]pplication of the rule . . . deflects the truth-finding process and often frees the guilty. The

> disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice. Thus, although the rule is thought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice.

Id. at 490-91, 96 S.Ct. at 3050 (footnotes omitted).

Balancing our concern for the protection of Humphries' fourth amendment rights against our concern for the truth, we find that the exclusionary rule and the fruits of the poisonous tree doctrine bar the use of any and all evidence gained as a result of the surveillance of the Scottsdale residence. Stine exploited the illegal arrest of Humphries when he used information gathered during Humphries' detention to identify Humphries in Scottsdale. That identification played a large part in Stone's ordering the stakeout of that residence. Thus, the road from the illegal actions of the BIA to the evidence gained by surveilling was short and straight. *See United States* v. *Ceccolini*, 435 U.S. 268, 275, 98 S.Ct. 1054, 55 L.Ed.2d 268 (1978). In such a case, the deterrence of the exclusionary rule is required, and the public's interest in convicting lawbreakers must be subordinated to fourth amendment interests. We therefore find that Judge Davies did not err in suppressing the photographs and other evidence from the surveillance.

C. *Thompson's Testimony*

James "Bullet" Thompson was located by Agent Stine from information discovered by BIA agents investigating the crashed airplane near San Carlos.[13] There was no taint from the illegal arrest attaching to Stine's location of Thompson. Once located, however, Thompson only implicated Humphries in the marijuana smuggling operation upon being asked specifically about him. And Stine questioned Thompson specifically about Humphries only because of information tainted by the illegal arrest.[14]

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[13] BIA agents discovering the downed aircraft located a motel receipt inside the cockpit in Thompson's name. They also received information from a truck driver who took a man from the area of the crash to the local airport. The airport manager told them that the hitch hiker had called a taxi and in checking with the motel to which the taxi took the hitch hiker, they discovered his name: James "Bullet" Thompson. In following up these leads, Stine located Thompson. It therefore appears that Stine's discovery of Thompson was in no way related to the illegal arrest of Humphries.

[14] Stine claims to have had knowledge of Humphries' identity and possible involvement in the smuggling venture through two separate sources. The first of these was through information obtained during the illegal arrest of Humphries.

Humphries' name had also entered the investigation when BIA agents stopped Lon Raymond Jordan near the crash site. Stine knew Jordan to have been arrested for drug-related offenses in the past. He therefore obtained a list of Jordan's known associates, among whom was Humphries.

In response to questioning by defense counsel Stine testified that Jordan had "[r]oughly 30 to 40" known associates all of whom were "checked out." Driver's license pictures of

In *United States* v. *Ceccolini*, the Supreme Court held that the taint of unlawful police action could be dissipated by the exercise of free will by a witness. The Court said,

> Evaluating the standards for application of the exclusionary rule to live-witness testimony in light of this balance, we are first impelled to conclude that the degree of free will exercised by the witness is not irrelevant in determining the extent to which the basic purpose of the exclusionary rule is advanced by its application. This is certainly true when the challenged statements are made by a putative defendant after arrest, *Wong Sun* [v. *United States*, 371 U.S. at 491, 83 S.Ct. 407]; *Brown* v. *Illinois*, [422 U.S. 590, 603, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975)], and *a fortiori* it is true of testimony given by nondefendants.

435 U.S. at 276, 98 S.Ct. at 1060. Thus, a distinction was made between the "live witness" testimony of a potential co-defendant and that of a witness not arrested and not implicated in the criminal activities at issue. Additionally, the Court stated that an exercise of free will by a witness may dissipate the taint

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each were compared to photos taken during the surveillance of the house in Scottsdale.

Neither of these sources of information about Humphries was free from the taint of his illegal arrest. The BIA information about Humphries was obtained during that arrest, while the BIA information concerning Jordan indicated that Humphries was a suspect only when the picture of Jordan's associates were compared with pictures taken during the surveillance tainted by the illegal arrest.

of unlawful police action only where "any statements [made by the witness] are truly the product of detached reflection and a desire to be cooperative." *Id.*

In this case, it is clear that Thompson was implicated in the marijuana smuggling operations: he was the alleged pilot of the marijuana-carrying airplane. Moreover, Thompson answered Stine's questions as part of a "plea agreement." "Under such circumstances it is unreasonable to infer that [Thompson's] response [to Stine's questions] was sufficiently an act of free will to purge the primary taint . . . ." *Wong Sun* v. *United States*, 371 U.S. at 486, 83 S.Ct. at 416. Therefore, the testimony of Thompson concerning Humphries and his part in the criminal endeavor is tainted and was properly suppressed.[15]

IV. *Conclusion*

In sum, we affirm so much of Judge Davies' order, as suppresses the photographs taken during, and other evidence obtained through, the surveillance of the Scottsdale residence. We also affirm that portion

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[15] We do not here decide the question of whether an exercise of free will could ever dissipate a taint attaching to information used to question any witness or potential witness. Whether the *Ceccolini* rationale, announced as it was in a case involving the use of tainted information to *discover* a witness, is properly applicable to a situation where the discovery of the witness is untainted but the information *used to question* that witness is tainted is unclear. We only decide that, even if *Ceccolini* is applicable to a case such as that at hand, the standards for dissipation are not met under the facts and circumstances before the court.

of the order suppressing Thompson's testimony concerning the identity and participation of Humphries in the marijuana smuggling operation. We reverse as to Sisto's testimony, which is admissible and as to evidence concerning the license number of the car discovered by Stine at the Scottsdale residence. We remand for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, REMANDED FOR FURTHER PROCEEDINGS.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 78-1622

[Filed Apr. 5, 1979]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

JOHN RICHARD HUMPHRIES, DEFENDANT-APPELLEE

ORDER

Before: CHOY and SNEED, Circuit Judges, and KELLEHER,* District Judge.

Upon due consideration, the Government's petition for rehearing is Denied, and its alternate request that we hold this case pending disposition by the Supreme Court of *United States* v. *Crews*, (D.C. Cir., June 14, 1978), cert. granted Feb. 21, 1979, is Denied.

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* The Honorable Robert J. Kelleher, United States District Judge for the Central District of California, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No. CR-77-147-PHX-CAM/RND

UNITED STATES OF AMERICA, PLAINTIFF

v.

JOHN RICHARD HUMPHRIES, DEFENDANT

ORDER

This Court, having heard testimony and argument on February 15, 1978 on Plaintiff's Motion for Determination of Admissibility of Evidence, and having considered the memoranda filed by the parties, and the testimony taken on October 6, 1977 at defendant HUMPHRIES' Motion to Suppress, finds that the Motion for Determination of Admissibility of Evidence is denied; the Court further finds that all evidence concerning the identity and participation of defendant HUMPHRIES in this case is suppressed for the reason that the Plaintiff has not shown that any of said evidence is derived from a source other than the illegal arrest of defendant HUMPHRIES.

DATED this 17th day of February, 1978.

/s/ Ronald N. Davies
RONALD N. DAVIES
District Court Judge

By: /s/ Rosalie Womack
ROSALIE WOMACK
Deputy Clerk

cc: U. S. Atty.
David S. Hoffman

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